

A **Md Aris bin Zainal Abidin v Suruhanjaya
Pasukan Polis & Anor**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-01-136
OF 1995

B GOPAL SRI RAM, MOHD SAARI AND ABDUL KADIR SULAIMAN JJCA

14 MAY 2002

C *Administrative Law* — Remedies — Certiorari — Application for leave filed more than six weeks after decision was made — Whether it was a fair procedure to require an applicant for certiorari to move the court for leave within six weeks from the date of the decision — Whether O 53 r 1A of the Rules of the High Court 1980 should be read harmoniously with art 5(1) of the Federal Constitution so that time would only begin to run from the date the decision was communicated — Rules of the High Court 1980 O 53 r 1A, Federal Constitution art 5(1)

D *Administrative Law* — Rules of natural justice — Certiorari — Whether rule requiring an applicant to make his application for leave for certiorari within six weeks from the date of a decision contrary to rules of natural justice — Whether O 53 r 1A of the Rules of the High Court 1980 should be read harmoniously with art 5(1) of the Federal Constitution so that time would only begin to run from the date the decision was communicated — Rules of the High Court 1980 O 53 r 1A, Federal Constitution art 5(1)

E *Civil Procedure* — Certiorari — Application for leave to apply — Application for leave to issue certiorari to quash decision — Application for leave filed more than six weeks after decision was made — Whether High Court was right in dismissing application for leave on the basis of delay in filing application — Whether it was a fair procedure to require an applicant for certiorari to move the court for leave within six weeks from the date of the decision — Whether O 53 r 1A of the Rules of the High Court 1980 should be read harmoniously with art 5(1) of the Federal Constitution so that time would only begin to run from the date the decision was communicated — Rules of the High Court 1980 O 53 r 1A, Federal Constitution art 5(1)

G The appellant was a police inspector. On 28 December 1992, he was dismissed from service. The decision dismissing him was communicated to him on 16 January 1993 but it was not until 11 February 1993 that he filed his application for leave to issue certiorari to quash the decision dismissing him. Leave was granted on 29 March 1993. However, at the hearing of the substantive motion, the federal counsel at the outset took a preliminary objection as to the jurisdiction of the court to hear the matter. The argument was that the application having been filed more than six weeks after the date of the decision, the court had no jurisdiction to entertain the motion, by virtue of O 53 r 1A of the Rules of the High Court 1980 ('the RHC') (as it stood before the order was replaced vide PU(A) 342/2000). Following *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor*, the judge upheld the preliminary objection and dismissed the substantive motion in limine. The appellant appealed.

I The appellant's contention was that O 53 r 1A of the RHC, insofar as it required the application for leave to be made within six weeks from the date of the decision, provided for an unfair procedure.

Held, allowing the appeal:

- (1) The pertinent question that arose in the instant appeal was whether it was a fair procedure to require an applicant for certiorari to move the court for leave within six weeks from the date of the decision. For example, it would be possible for an administrator to make a decision, keep it to himself for more than six weeks and then release it to the person who was adversely affected by the decision. Based on the wording of O 53 r 1A of the RHC, it would mean that that person would be out of time before making any application to court. Hence, it was contrary to the rules of natural justice to require an applicant to make his application for leave for certiorari within six weeks from the date of a decision (see pp 109I, 110A–C).
- (2) Procedural provisions were no longer to be regarded as mandatory. Rather, the true question to be considered was whether on the facts of a given case, the particular non-observance had occasioned injustice or prejudice. Order 53 r 1A of the RHC should be read harmoniously with art 5(1) of the Federal Constitution and when this was done the words ‘...after the date of the proceedings ...’ must be interpreted so that time would only begin to run from the date the decision was communicated to the appellant (see p 111F, H); *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 not followed.

[Bahasa Malaysia summary]

Perayu merupakan seorang inspektor polis. Pada 28 Disember 1992, beliau telah dipecat dari perkhidmatan. Keputusan untuk memecatnya disampaikan kepada beliau pada 16 Januari 1993 tetapi hanya pada 11 Februari 1993 barulah beliau memfailkan permohonan meminta kebenaran untuk mengeluarkan perintah certiorari bagi membatalkan keputusan memecatnya. Kebenaran diberikan pada 29 Mac 1993. Namun demikian, di pembicaraan usul substantif tersebut, peguam persekutuan telah mengambil bantahan awal terhadap bidang kuasa mahkamah untuk mendengar perkara tersebut. Hujahnya adalah oleh kerana permohonan difailkan lebih daripada enam minggu selepas keputusan untuk memecat perayu dibuat, maka mahkamah tidak mempunyai bidang kuasa untuk melayan usul ini, menurut A 53 k 1A Kaedah-Kaedah Mahkamah Tinggi 1980 (‘KMT’) (pada masa itu sebelum Aturan tersebut diganti melalui PU(A) 342/2000). Dengan mengikut keputusan di dalam kes *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor*, hakim mengesahkan bantahan awal tersebut dan menolak usul substantif in limine. Perayu telah merayu. Hujah perayu adalah bahawa A 53 k 1A KMT, sejauhmana ia menghendaki permohonan meminta kebenaran dibuat dalam tempoh enam minggu dari tarikh keputusan, memperuntukkan satu prosedur yang tidak adil.

A Diputuskan, membenarkan rayuan tersebut:

- (1) Persoalan utama yang timbul dalam rayuan ini adalah sama ada ia adalah satu prosedur yang adil yang mana pemohon certiorari dikehendaki memohon kepada mahkamah untuk kebenaran mengeluarkan certiorari dalam tempoh enam minggu dari tarikh keputusan tersebut. Misalnya, adalah mungkin untuk seorang pentadbir membuat keputusan, merahsiakannya lebih dari enam minggu dan kemudiannya barulah memaklumkan kepada orang yang terjejas oleh keputusan tersebut. Berdasarkan susun kata A 53 k 1A KMT, ia akan bermaksud bahawa orang itu kesuntukan masa sebelum membuat apa-apa permohonan kepada mahkamah. Justeru itu, adalah bertentangan dengan rukun keadilan asasi untuk menghendaki seseorang pemohon membuat permohonan kebenaran untuk certiorari dalam tempoh enam minggu dari tarikh keputusan (lihat ms 109I, 110A–C).
- (2) Peruntukan prosedur tidak lagi dianggap mandatori. Sebaliknya, soalan sebenar yang harus ditimbang adalah sama ada berdasarkan fakta-fakta satu kes tertentu, ketidakpatuhan yang khusus ini telah menyebabkan ketidakadilan atau prasangka. Aturan 53 k 1A KMT haruslah dibaca selaras dengan perkara 5(1) Perlembagaan Persekutuan dan apabila ini dilakukan kata-kata ‘... after the date of the proceedings ...’ mestilah ditafsirkan supaya masa hanya bermula dari tarikh keputusan disampaikan kepada perayu (lihat ms 111F, H); *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 tidak diikuti.

F Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 508–509 and 577–578.

For cases on application for leave to apply for certiorari, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1368–1369.

G Cases referred to

Bank of America National Trust and Savings Associations v Chai Yen [1980] 1 MLJ 198 (refd)

Dunlea v Attorney General [2000] 3 NZLR 136 (refd)

H *Ramesh Lawrence Maharaj v AG of Trinidad and Tobago (No 2)* [1979] AC 385 (refd)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54 (not folld)

Nilabati Bahera v State of Orissa 1993 AIR SC 1960 (refd)

I *R v Immigration Appeal Tribunal; ex parte Jeyeanthan* [1999] 3 All ER 231 (refd)

Secretary of State for Defence v Warn [1970] AC 394 (refd)

Simpson v Attorney General [1994] 3 NZLR 667 (refd)

Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266 (refd) **A**

Legislation referred to

Courts Judicature Act 1964 s 16

Federal Constitution art 4(1), Part II **B**

Appeal from: Originating Summons No 25–3 of 1993 (High Court, Pulau Pinang)

Mohd Ismail Mohamed (Ismail Khoo & Assoc) for the appellant.

Asmabi Mohamad (Senior Federal Counsel, AG's Chambers) for the respondents. **C**

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal concerns the interpretation of a rule that is no longer with us. It is r 1A of O 53 of the Rules of the High Court 1980 'the RHC' as it stood before the whole of that order was replaced vide PU A 342/2000 which came into force on 22 September 2000. **D**

The factual matrix which forms the background of this appeal may be shortly stated.

The appellant was a police inspector. On 28 December 1992, he was dismissed from service. The decision dismissing him was communicated to him on 16 January 1993 but it was not until 11 February 1993 that he filed his application for leave to issue certiorari to quash the decision dismissing him. Leave was granted on 29 March 1993. However, at the hearing of the substantive motion, the learned federal counsel at the outset took a preliminary objection as to the jurisdiction of the court to hear the matter. The argument was that the application having been filed more than six weeks after 28 December 1992, the court had no jurisdiction to entertain the motion; that being clear from the plain words of r 1A of the RHC. **E**

The authority cited before the learned judge and by which he was clearly bound was *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54. The learned judge acceded to the preliminary objection; as he was obliged to. The substantive motion was dismissed *in limine*. The appellant now appeals to us. **F**

The point now taken before us is that r 1A of the RHC insofar as it requires the application for leave to be made within six weeks from the date of the decision provides for an unfair procedure. In our view, there is merit in this argument. **G**

All laws enacted in the Federation of Malaysia whether by Parliament or by any inferior law making authority such as the Rules Committee acting under s 16 of the Courts Judicature Act 1964 must accord with the Federal Constitution, the supreme law by its own declaration (see art 4(1) of the Federal Constitution). **H**

It is therefore axiomatic that no lawmaker within our shores has authority to make law which contravenes the Federal Constitution. **I**

- A It matters not a jot whether the law is substantive or procedural; constitutional compliance is mandatory.

- B Courts like any other arm of the government are similarly bound by the Federal Constitution. But there is a difference. A decision of a court cannot be challenged on the ground that it is unconstitutional simply because it contains an error of fact or an error of law. That is because there is a self-correction process available within the justice system by means of an appeal at one or more levels. However, a procedural rule of court does not enjoy the same protection.

- C These propositions are amply clear from the following passage in the judgment of Lord Diplock in *Ramesh Lawrence Maharaj v AG of Trinidad and Tobago (No 2)* [1979] AC 385 at p 399:

- D In the first place, no human right or fundamental freedom recognized by Chap 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kind is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event.

- F The other authority we would refer to is *Bank of America National Trust and Savings Associations v Chai Yen* [1980] 1 MLJ 198. Lord Lane delivering the judgment of the Privy Council had this to say at p 199:

- The essence of any rule of procedure must be fairness, and to apply stringently the provisions of r 13(a) [of the Federal Court (Civil Appeals) (Transitional) Rules 1963] would in the circumstances such as the present work manifest injustice to the respondent.

- G We are conscious that the remarks made by Lord Diplock were in reference to the Constitution of Trinidad and Tobago, a sister nation within the Commonwealth. However, the provisions of the Constitution that the Privy Council was dealing with in that case are principally those provisions entrenching fundamental human rights that are entrenched within Part II of our Federal Constitution.

- H Further, it may be relevant to observe that *Maharaj's* case has been applied in other jurisdiction; having Constitutions similar to our own (see *Nilabati Bahera v State of Orissa* 1993 AIR SC 1960, *Simpson v Attorney General* [1994] 3 NZLR 667 and *Dunlea v Attorney General* [2000] 3 NZLR 136).

- I That brings us to the present appeal. The pertinent question that arises is whether it is a fair procedure to require an applicant for certiorari to move the court for leave within six weeks from the date of the decision.

If it is, then it is the end of the matter. But we do not think that it is. As observed by our learned brother, Abdul Kadir Sulaiman JCA during yesterday's proceedings, it will be quite possible for an administrator to make a decision, keep it to himself for more than six weeks and then release it to the unfortunate citizen who is adversely affected by the decision. If we follow the actual wording of r 1A of the RHC, it would mean that the litigant, ie private citizen would be out of court even before he arrived there. Examples may be multiplied, with no assistance. But we are unable to say that there is really an answer to the illustration provided by our learned brother.

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In our judgment, it is contrary to the rules of natural justice to require an applicant to make his application for leave for certiorari within six weeks from the date of a decision.

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Take this very case. The decision was made on 28 December 1992 and was communicated to the appellant on 16 January 1993. Learned senior federal counsel's argument is that he had three weeks nevertheless to make the application. With respect, the point that the argument misses is that the appellant would have had nine weeks and not three weeks if the rule were held to be contrary to natural justice.

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What remains is the decision of *Mersing Omnibus Co Sdn Bhd v Minister of Labour And Manpower & Anor*. The judge is not to be faulted for applying it. We have already said the judge was obliged to do so. But what is plainly obvious from the reading of the judgment in that case is that the argument raised before us was neither raised nor considered there. We cannot predict what the decision would have been had the point of constitutionality been pursued. But this is not the only point about that case. There is another. And it is this.

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In the course of its judgment, the former Federal Court referred to the following passage in the speech of Lord Hodson in *Secretary of State for Defence v Wain* [1970] AC 394, at p 402:

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Procedural sections are usually mandatory and there is nothing which points to the contrary in this case.

However, we would observe that there has been a substantial departure from that view in recent times in England. This is reflected in the seminal judgment of Lord Woolf MR (now the Lord Chief Justice of England and Wales) in *R v Immigration Appeal Tribunal; ex parte Jeyanthan* [1999] 3 All ER 231. The first passage is at p 235 where the learned Master of the Rolls sets out the previous position as follows:

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The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorized as directory or mandatory. If it is categorized as directory it is usually assumed it can be safely ignored. If it is categorized as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what

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- A** the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on a consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory. The requirement is never intended to be optional if a word such as 'shall' or 'must' is used.
- B** The second passage is at p 238. It is of critical importance and reflects what we consider should be the approach we should take. It reads:
- [I] suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
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- D**
- E** Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.
- F**
- The nett effect of the foregoing passage is that procedural sections are no longer to be regarded as mandatory. Rather, the true question that arises for consideration is whether on the facts of a given case, the particular non-observance has occasioned injustice or prejudice.
- G** In view of what we have expressed thus far, we find ourselves unpersuaded by the argument that *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* continues to hold the force of binding precedent. While therefore not faulting the learned judge for applying it, we are disinclined to do so ourselves.
- H** In our considered judgment r 1A of the RHC should be read harmoniously with art 5(1) of the Federal Constitution. When this is done, the words '... after the date of the proceedings' must fall to be interpreted so that time runs from the date the decision was communicated to the appellant.
- I** This is not the first time that our courts are applying the rule of harmonious construction. We have done it elsewhere (see *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266).

For the reasons already given we are of the view that the preliminary objection ought to have failed before the High Court. We would therefore allow this appeal and set aside the order of the learned judge. We would restore the substantive motion paper to file and remit it to the High Court for hearing on the merits. There will be no order as to costs. We also make an order for the deposit to be refunded to the appellant.

Appeal allowed.

Reported by Lim Lee Na

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